

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PAMELA R. FLANSBURG

Plaintiff, No. CIV S-04-1836 CMK

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant. ORDER

Plaintiff, Pamela R. Flansburg, seeks judicial review of an administrative decision of defendant Commissioner of Social Security denying plaintiff's claim for disability benefits under the Social Security Act. This action is before the undersigned pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3) and Local Rule 72-302. Plaintiff has filed a motion for summary judgment or remand. Defendant has filed a cross motion for summary judgment. As both parties have consented to magistrate jurisdiction, the matter is before the undersigned for decision. For the reasons discussed below, the court will deny plaintiff's motion for summary judgment or remand and grant the Commissioner's cross motion for summary judgment.

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1 **I. BACKGROUND**

2 Plaintiff filed an application for disability insurance benefits (DIB) on March 20,
3 2002, alleging an inability to work due since June 1, 1997 due to fibromyalgia, degenerative disc
4 disease, chronic fatigue syndrome, neuroma, sciatic nerve pain and rheumatoid arthritis. (Tr.
5 121-123, 132.) Plaintiff's application was denied initially and upon reconsideration. A hearing
6 was held before an administrative law judge (ALJ) on April 16, 2004. (Tr. 33.) Plaintiff was
7 represented by an attorney, and a medical expert and a vocational expert and plaintiff's mother
8 testified. (Tr. 31-90.)

9 At the hearing before the ALJ, plaintiff testified that she was fifty years old, and
10 she had attended two years of college where she received an AA degree in child development.
11 (Tr. 39.) Plaintiff stated that she took junior college classes for a job when living in Bakersfield.
12 (Tr. 39.) Plaintiff stated that she loved working in childcare but stopped because it was too hard
13 for her. (Tr. 43-44.) Plaintiff stopped working seven years ago. (Tr. 49.)

14 Plaintiff testified that she has good and bad days. (Tr. 49.) Plaintiff related that
15 she experienced swelling, especially of her feet and legs. (Tr. 47, 57.) She has pain in her right
16 shoulder following surgery. (Tr. 50.) Plaintiff reported that surgery had helped her left shoulder
17 a little bit. (Tr. 60.) She stated that she has lower back pain, which radiates down her right leg.
18 (Tr. 54.) Plaintiff likened the pain in her leg to "electric shock" but stated that sometimes the
19 pain was a "strong tingly down the leg, numbness." (Tr. 54.) The numbness occasionally occurs
20 when she sits down for extended periods. (Tr. 54-55.) To relieve the tingling, plaintiff has to
21 lie down for approximately thirty minutes. (Tr. 55.) Plaintiff stated that her weight has changed
22 dramatically in the past year (she has gained twenty-five pounds, moving from 220 pounds to
23 245 pounds) and that she has problems with her knees being stiff and sore. (Tr. 58.)

24 Plaintiff reported that she was offered a three-level fusion for her back problems,
25 which she refused. (Tr. 56.) Plaintiff did have a discogram and a nerve block performed to try
26 to alleviate her back pain. (Tr. 56.) Plaintiff stated that the nerve block did not help her. (Tr.

1 57.) She states that she can only walk a block before she needs to sit down. (Tr. 57.) She stated
2 that she has a panic disorder stemming from fear of being in enclosed spaces. (Tr. 60.) She also
3 has a fear of having allergic reactions to medications. (Tr. 60.)

4 Plaintiff testified that she takes eleven medications either every day or as needed.
5 (Tr. 46.) Every day plaintiff takes Prozac, Relafen, Flexeril, Atenolol, Lipitor and Premarin.
6 (Tr. 46.) She takes Reglan three or four times a month and also has Tylenol with Codine No. 3
7 that she takes twice a week, although she is trying not to take them. (Tr. 47.) Plaintiff takes
8 Xanax and Lasix for fluid retention. (Tr. 48.) Plaintiff reports medication side-effects of
9 "drowsiness, [and] nausea occasionally." (Tr. 60.)

10 Plaintiff stated that she tries to take care of her personal needs, including her
11 personal laundry. (Tr. 49-56.) On some days, plaintiff cannot pass food at the table due to pain
12 in her arms. (Tr. 49.) She can feed herself but sometimes has problems dressing herself. (Tr.
13 49-50.) She cannot lift a gallon of milk and must have milk poured for her when she uses it.
14 (Tr. 50.) Notes from plaintiff's physician reflect that, in July of 2002, plaintiff was going to the
15 gym five nights a week with her husband. (Tr. 52-53.) Plaintiff stated that, at the time of the
16 hearing, she had not been to the gym in over a year. (Tr. 53.)

17 Medical Expert (ME), Leo van der Reil, M.D., testified that Plaintiff's medical
18 impairments did not satisfy any listed impairment. (Tr. 67.) The ME stated that part of
19 plaintiff's physical problems might be related to her depression and part might be related to her
20 medication. (Tr. 67.) He noted that plaintiff did have some evidence of a degree of degenerative
21 disc disease, but stated that the "degree of symptomatology was not in keeping with the physical
22 findings." (Tr. 67.) The ME stated that plaintiff's extruded disk L4/L5 could have deteriorated
23 since the time of diagnosis eight years ago due to plaintiff's weight gain and other factors. (Tr.
24 70.) The ME stated that there was no evidence of such deterioration, but that was the logical
25 conclusion. (Tr. 70.) The ME testified that there was no evidence in the record that plaintiff had
26 fibromyalgia; plaintiff did not have the "so-called classical findings" of the disease. (Tr. 72.)

1 The ME recognized, after questioning by plaintiff's attorney, that fibromyalgia was shown in the
2 file; however, he stated that, when written in the charts, fibromyalgia did not have the same
3 meaning as the diagnosis referred to by the Social Security Administration. (Tr. 73.) The ME
4 said that plaintiff's high "sed. rate" in September of 2002 was not necessarily indicative of
5 fibromyalgia, but instead might have been caused by medications. (Tr. 74.)

6 Plaintiff's mother, Joy J. Armstrong, testified about plaintiff's daily living
7 activities. (Tr. 76.) Ms. Armstrong testified that plaintiff did not do many household chores
8 because she could not use her arms or be on her feet. (Tr. 79.) She stated that plaintiff
9 sometimes needs help in dressing herself but that plaintiff could take care of her personal
10 hygiene. (Tr. 79.) Ms. Armstrong stated that plaintiff has to sit or lie down during the course of
11 the day and cannot walk for more than ten minutes. (Tr. 79.)

12 Vocational Expert (VE), John Velton, testified that plaintiff worked as "a
13 teacher's aide II" (light semi-skilled work) and could perform her prior work. (Tr. 82-89, 106.)
14 The VE noted that the exertional level in plaintiff's former work was light, although it may have
15 reached the medium level. (Tr. 83.) He stated that plaintiff's job involved frequent reaching,
16 handling and fingering. (Tr. 84.) The VE stated that this job would require occasional agility.
17 (Tr. 89.)

18 The relevant medical records reveal the following. Plaintiff was diagnosed with
19 degenerative disc disease (Tr. 212, 283), status post shoulder impingement syndrome (Tr. 285,
20 293), anxiety disorder (Tr. 236-237), and probable degenerative joint disease of the right knee.
21 (Tr. 210, 15). Chronic fatigue syndrome has not been diagnosed, but is noted in plaintiff's
22 medical history. (Tr. 15, 246, 288-89.)

23 A physician at Kaiser Permanente (Kaiser) diagnosed plaintiff with fibromyalgia
24 after noting that plaintiff showed "some chronic fibromyalgia, LBP, etc." (Tr. 203.) The
25 diagnosis apparently was not questioned or confirmed by other medical providers and was
26 repeated in plaintiff's medical records by way of history. (Tr. 15, 177, 179, 245, 257.)

1 In July 2002, plaintiff was evaluated by Diane Van Arsdale, Ph.D. for possible
2 depression. (Tr. 245-47.) Dr. Arsdale noted that plaintiff did not “really see herself as
3 depressed—only reacting to chronic pain.” (Tr. 247.) Dr. Arsdale noted that, based on plaintiff’s
4 descriptions, plaintiff did not meet the criteria for pain disorder. (Tr. 246-48.) Dr. Van Arsdale
5 diagnosed anxiety disorder, not otherwise specified (NOS) with “mixed anxiety—depression,”
6 and assigned a global assessment of functioning (GAF) of 60.¹ Dr. Van Arsdale suggested
7 therapy and medication evaluation to “reduce depression and anxiety” and “improve coping
8 skills.” (Tr. 243.)

9 In September 2002, plaintiff was evaluated by a “chronic pain team” at Kaiser;
10 noted to have a high sedimentation rate; and referred to a rheumatologist for “evaluation of
11 possible PMR” (polymyalgia rheumatica). (Tr. 16, 213, 228-230.) Plaintiff apparently did not
12 follow-up on the referral.

13 In September 2002, consultative orthopedist Calvin Pon, M.D., diagnosed
14 “chronic low back pain” and “chronic intermittent right knee pain” and said that plaintiff could
15 lift and carry twenty pounds frequently, twenty to thirty pounds occasionally; stand or walk six
16 hours in an eight hour workday; sit six hours in an eight hour workday and occasionally stoop,
17 crouch, kneel, squat and climb ladders. (Tr. 210.) Dr. Pon assigned “no limitations” in reaching,
18 fine/gross manipulation, crawling, climbing stairs, or pushing/pulling arm/hand and leg/foot
19 controls. (Tr. 210-211.) He noted that plaintiff was able to drive and able to take public
20 transportation. (Tr. 211.)

21 Consultative psychiatrist Robert Hepps M.D. examined plaintiff in September of
22 2002. (Tr. 214-15.) Dr. Hepps diagnosed panic disorder and opined that plaintiff’s disability
23 was primarily physical. (Tr. 215.) He stated that “because of memory and concentration

24 ¹GAF 51-60: Indicates “moderate symptoms” (e.g., flat affect, circumstantial speech,
25 occasional panic attacks) OR “moderate difficulty” in social, occupational, or school functioning
26 (e.g., few friends, conflicts with peers/co-workers). Diagnostic & Statistical Manual of Mental
Disorders, 32, Amer. Psych. Assn. (4th ed.)

1 problems she would probably have a very slight impairment in remembering instructions and
2 carrying them out." (Tr. 215.) He opined that plaintiff could relate appropriately to co-workers
3 and supervisors and "could respond appropriately to routine changes in a workplace setting."
4 (Tr. 215.)

5 In October 2002, a State agency physician opined that plaintiff could lift/carry
6 twenty pounds occasionally, ten pounds frequently; stand and/or walk at least two hours in an
7 eight-hour workday; occasionally climb, balance, stoop, kneel, crouch and crawl; and was
8 unlimited in pushing/pulling hand and foot controls. (Tr. 287-89.)

9 In a written decision dated June 2, 2004, the ALJ found that plaintiff's medically
10 determinable impairments significantly limited her ability to perform basic work activities, but
11 that plaintiff had not established that she had any impairment or combination of impairments that
12 met or equaled the Listed Impairments. The ALJ considered plaintiff's subjective statements
13 concerning pain and other symptoms, but did not find them credible. He concluded that the
14 plaintiff was not under a disability within the meaning of the Social Security Act at any time on
15 or before the date of his decision.

16 Plaintiff submitted additional medical records after the ALJ's rendered his
17 decision. (Tr. 300, 9.) The Appeals Council made the additional evidence part of the record.
18 (Tr. 8.) In reviewing plaintiff's case, the Appeals Council considered plaintiff's additional
19 evidence. (Tr. 5.) On July 19, 2004, the Appeals Council denied plaintiff's request for review,
20 making the decision of the ALJ final. The plaintiff filed a timely appeal in this court on
21 September 2, 2004.

22 **II. STANDARD OF REVIEW**

23 This court's review is limited to whether the Commissioner's decision to deny
24 benefits to plaintiff is based on proper legal standards under 42 U.S.C. § 405(g) and supported
25 by substantial evidence on the record as a whole. See Copeland v. Bowen, 861 F.2d 536, 538
26 (9th Cir. 1988) (citing Desrosiers v. Secretary of Health and Human Services, 846 F.2d 573,

1 575-76 (9th Cir. 1988)). Substantial evidence means more than a mere scintilla of evidence, but
2 less than a preponderance, Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996) (citing Sorensen v.
3 Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)). “It means such evidence as a reasonable
4 mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389,
5 402, 91 S. Ct. 1420 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229, 59
6 S. Ct. 206 (1938)). The court must consider both evidence that supports and evidence that
7 detracts from the Commissioner’s decision, but the denial of benefits shall not be overturned
8 even if there is enough evidence in the record to support a contrary decision. See Jones v.
9 Heckler, 760 F.2d 993, 995 (9th Cir. 1985). If substantial evidence supports the administrative
10 findings, or if there is conflicting evidence supporting a finding of either disability or
11 nondisability, the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d 1226, 1229-
12 30 (9th Cir. 1987), and may be set aside only if an improper legal standard was applied in
13 weighing the evidence. See Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

14 **III. DISCUSSION**

15 Plaintiff argues that the ALJ erred in finding plaintiff’s testimony not credible.
16 The Ninth Circuit has consistently held that the ALJ is responsible for determining credibility
17 and resolving conflicts in medical testimony. See Magallanes v. Bowen, 881 F.2d 747, 750 (9th
18 Cir. 1989); Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). Although the ALJ is
19 responsible for determining credibility, resolving conflicts in medical testimony and resolving
20 ambiguities, see Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995), the ALJ’s credibility
21 findings must be supported by specific, cogent reasons. See Rashad v. Sullivan, 903 F.2d 1229,
22 1231 (9th Cir. 1990). In determining whether subjective complaints are credible, the ALJ may
23 consider, among other things, unexplained or inadequately explained failure to seek treatment or
24 follow a prescribed course of treatment and the applicant’s daily activities. See Smolen v.
25 Chater, 80 F.3d 1273, 1284 (9th Cir. 1996); Light v. Chater, 119 F.3d 789, 792 (9th Cir. 1997).

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1 The ALJ's determination of plaintiff's credibility is supported by substantial
2 evidence in the record. The ALJ noted that plaintiff testified in 2004 that she had moved from
3 Pittsfield, California to Bakersfield, California in November of 2003 but had not yet visited her
4 new primary care physician. (Tr. 22.) The ALJ also took into account that plaintiff had alleged
5 disabling fibromyalgia and rheumatoid arthritis, but there was no indication that plaintiff had
6 followed through with her referral to a rheumatologist. (Tr. 22.) The ALJ noted that, although
7 plaintiff alleged disabling mental impairments, the medical records indicated that she had met
8 with a psychiatrist only twice and then stopped attending therapy sessions because, as she
9 testified at the hearing, she "just sort of stopped going." (Tr. 22.) The ALJ noted that plaintiff
10 was able to travel to Kenya in 1998, which was after she alleged a disability beginning on June
11 1, 1997. (Tr. 22.)

12 The ALJ noted that the objective findings in the medical record did not support
13 plaintiff's complaints. See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001)(stating
14 that the ALJ may properly consider medical evaluations which discredit subjective complaints).
15 The medial record reveals that plaintiff had some pathology in her spine since at least January
16 1993; however, plaintiff was not prevented from working. Finally, the ALJ considered that,
17 following plaintiff's evaluation by the Kaiser pain team, she had the opportunity for a
18 rheumatology evaluation, a referral to a spine clinic, edema management/steroid injections in her
19 feet, injections to her knees, acupuncture/acupressure, neurocognitive screening,
20 fibromyalgia/pain management group appointments and continued mental health treatment but
21 that plaintiff did not take advantage of any of these treatment options. (Tr. 22.) See e.g., Jonson
22 v. Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995) (stating that the ALJ may consider the
23 conservative nature of treatments when evaluating subjective complaints).

24 The ALJ's findings support his conclusion that plaintiff's complaints were not
25 wholly credible. Plaintiff's assertion that the ALJ's credibility assessment was based on an
26 incomplete record is not persuasive. Plaintiff makes no showing of how the post-decision

1 evidence would have impacted the ALJ's decision. The Appeals Council considered plaintiff's
2 additional evidence in reviewing her case and concluded that the evidence did not provide a
3 basis for changing the decision. (Tr. 5-6.) The undersigned has also reviewed the additional
4 evidence submitted by plaintiff and concludes that nothing in the additional medical records
5 undermines the ALJ's findings concerning plaintiff's credibility. See Morgan v. Comm'n of
6 Social Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999) (stating that if a credibility finding is
7 supported by substantial evidence in the record, the court may not engage in second guessing).
8 The undersigned finds that the ALJ's credibility determination is supported by substantial
9 evidence in the record.

10 Plaintiff next contends that the ALJ failed to give sufficient consideration to
11 plaintiff's mental impairments. An impairment or combination of impairments can be found
12 "not severe" only if the evidence establishes a slight abnormality that has "no more than a
13 minimal effect on an individual's ability to work." Yuckert v. Bowen, 841 F.2d 303, 306 (9th
14 Cir. 1988)(citing SSR 85-28). A claimant must prove a mental impairment by providing medical
15 evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statements
16 of symptoms alone will not suffice. See 20 C.F.R. §§ 404.1508, 416.908. It is up to the
17 Administrative Law Judge to resolve conflicts and ambiguities in the evidence. See Sandgathe
18 v. Chater, 108 F.3d 978, 979 (9th Cir. 1997).

19 Here, the ALJ considered that Dr. Van Arsdale diagnosed plaintiff with anxiety
20 disorder, NOS, with mixed anxiety and depression and assigned a GAF of 60, which indicated
21 that plaintiff had moderate symptoms and moderate difficulty in social and work settings. (Tr.
22 21, 248.) He noted that plaintiff testified that she attended approximately three therapy sessions
23 after Dr. Van Arsdale's diagnosis. (Tr. 21.) The ALJ considered that Dr. Robert Hepps
24 diagnosed plaintiff with panic disorder and that Dr. Hepps opined that, due to her symptoms,
25 plaintiff would have a very slight impairment in remembering instructions and carrying them
26 out. (Tr. 21.) The ALJ further noted that plaintiff told a nurse, the day after Dr. Arsdale's

1 diagnosis, that she did not feel depressed and that plaintiff stated that Prozac helped her mood
2 and did not cause side effects. (Tr. 21, 46); See Odle v. Heckler, 707 F.2d 439, 440 (9th Cir.
3 1983) (stating that controllable impairments are not disabling). Plaintiff did not provide medical
4 evidence to support her subjective complaints of mental illness. The ALJ here summarized the
5 facts and evidence in detailed and thorough fashion, stating his interpretation and making
6 findings. Sandgathe, 108 F.3d at 979. The undersigned therefore concludes that there was
7 substantial evidence supporting the ALJ's decision that plaintiff's mental impairments were not
8 disabling.

9 Plaintiff's next argument is that the ALJ erred as a matter of law by dismissing
10 the testimony of plaintiff's mother. Lay testimony as to a "claimant's symptoms or how an
11 impairment affects ability to work" is "competent evidence" and "cannot be disregarded without
12 comment." Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996). Testimony by a third party
13 alone is insufficient to establish disability. See 20 C.F.R. § 404.1529.

14 In the present case, the ALJ considered the testimony of plaintiff's mother and
15 found it to be neither wholly credible nor supported by the record as a whole. The ALJ noted
16 that the testimony of plaintiff's mother was "apparently founded" on her experiences with
17 plaintiff since plaintiff moved to Bakersfield, California in 2003, which was well after her date
18 last insured. (Tr. 22.) In short, the ALJ gave specific reasons stating that the testimony of
19 plaintiff's mother was more relevant to plaintiff's condition after December 2002, which was the
20 date by which plaintiff must have established disability. The undersigned finds that the ALJ
21 properly considered the testimony of plaintiff's mother.

22 Plaintiff's final argument is that the ALJ improperly relied on vocational expert
23 (VE) testimony because he did not ask hypothetical questions incorporating plaintiff's
24 documented impairments. The undersigned notes that the ALJ did not need to rely on the
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1 testimony of the VE in making a “step four”² finding that plaintiff can return to her previous
2 work. See Matthews v. Shalala, 10 F.3rd 678, 681 (9th Cir. 1993) (stating that vocational expert
3 testimony is helpful but not necessary in past work finding). However, even if the ALJ were
4 required to rely on an VE, he properly posed a hypothetical to the VE incorporating plaintiff’s
5 impairments. As long as the hypothetical question is supported by substantial evidence, the ALJ
6 may reject other limitations alleged by a claimant. See Magallanes v. Bowen, 881 F.2d at 756.

7 The VE here testified that plaintiff’s prior position of pre-school teacher’s aide II
8 involved standing approximately fifty percent of the time, sitting fifty percent of the time and
9 generally did not involve lifting. (Tr. 22.) The VE testified that, prior to plaintiff’s date last
10 insured and with the residual functional capacity to perform a range of light work, with an
11 alternate sit or stand option for approximately four hours of an eight hour work day, with limited
12 stooping, pushing or pulling and with no overhead work, the plaintiff could still perform her
13 past relevant work as a pre-school teacher’s aid. Because the hypothetical posed by the ALJ was
14 supported by the medical evidence, see Osenbrock v. Apfel, 240 F.3d 1157, 1162-63 (9th Cir.
15 2001), the ALJ was free to reject other more restrictive hypothetical functional capacities posed
16 by plaintiff’s attorney. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1986). The
17 undersigned finds that the ALJ properly relied on the testimony of the VE in finding that plaintiff
18 could perform her past work.

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24 ²Step four of the Social Security five step disability evaluation is, after considering all
25 impairments in combination and determining the claimant’s residual functional capacity, can the
26 claimant still perform past relevant work. Only if the answer is no, should the ALJ continue to
step five of the evolution, which requires the use of a VE. Sandgathe v. Chater, 108 F.3d 978,
979 (9th Cir. 1997).

1 **IV. CONCLUSION**

2 The ALJ's decision is fully supported by substantial evidence in the record and
3 based on the proper legal standards. Accordingly, IT IS HEREBY ORDERED that:

- 4 1. Plaintiff's motion for summary judgment or remand is denied,
5 2. The Commissioner's cross motion for summary judgment is granted and;
6 3. The Clerk of the Court is directed to enter judgment and close this file.

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8 DATED: February 9, 2006.

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11 CRAIG M. KELLISON
12 UNITED STATES MAGISTRATE JUDGE